IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL MISC.APPLICATION No 6020 of 1999

For Approval and Signature:

Hon'ble MR.JUSTICE Y.B.BHATT

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1. Whether Reporters of Local Papers may be allowed to see the judgements? YES : YES

2. To be referred to the Reporter or not? NO : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? NO : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? NO : NO

5. Whether it is to be circulated to the Civil Judge? NO : NO

SIRAJUDDIN FAKHRUDDIN QURESHI

Versus

STATE OF GUJARAT

Appearance:

MR MIG MANSURI for Petitioner

MR ND GOHIL, ADDL. PUBLIC PROSECUTOR for Respondent No. 1

MR MC BAROT for Respondent No. 2

CORAM : MR.JUSTICE Y.B.BHATT

Date of decision: 23/03/2000

ORAL JUDGEMENT

1. This is an application u/s 482 of the Criminal Procedure Code at the instance of the original accused in respect of the process issued by the learned JMFC, Prantij in Criminal Case No.618/97, who issued process on

the complaint filed by the respondent No.2 - complainant.

2. The complainant in the complaint alleged that the accused has committed an offence u/s 138 of the Negotiable Instruments Act, inasmuch as he issued a cheque in favour of the complainant, which came to be dishonoured by the bankers of the accused, that he had given a notice as required u/s 138 of the said Act, to which the accused did not comply and hence, the complaint.

3. The learned Magistrate has issued process on the basis of the said complaint, being treated as Criminal Case No.618/97, which is the subject matter of the present application u/s 482 of the Criminal Procedure Code.

4. Although a number of contentions have been taken by the learned counsel for the applicant - accused, only two main grounds require to be considered. Firstly, the learned Magistrate before whom the complaint was filed straightaway took cognizance of the same and issued process on the said complaint without examining the complainant u/s 200 of the Criminal Procedure Code. There is no controversy on the factual aspect that the complainant was not examined before issuing process. This is apparent from the fact that this contention was raised before the learned Magistrate in the application exh.10 filed by the accused. As regards this contention, the learned Magistrate merely observed that although the complainant has not been examined, the process has been issued by the predecessor judicial officer, and this would have been done by the said predecessor only if he had been satisfied that it is a fit case to issue the process. This does not in any manner address the basic legal fundamental question, that the Court cannot take cognizance of a private complaint unless the complainant has been examined u/s 200 of the Criminal Procedure Code by that Court for the purpose of achieving a personal satisfaction as to the prima facie case which may exist for issuing the process. Clearly, if process is issued without examining the complainant, issuance of the process is clearly illegal and deserves to be quashed and set aside.

The other contention raised by the learned counsel for the present applicant is to the effect that although the complainant had produced certain documents with the complaint namely, [1] bank return memo, [2] registered A.D. slip, [3] certificate of posting, and [4] copy of the statutory notice, what is most material

and what is not produced is either the cheque and/or copy of the cheque which is alleged to have been dishonoured. According to the learned counsel for the accused, this is a fatal flow inasmuch as an offence u/s 138 of the said Act could only be made out if the accused is the drawer of the cheque, and if the complainant is the drawee or holder in due course in respect of that cheque. The Court must be satisfied at least on a prima facie basis that these conditions exist before taking cognizance of the said complaint. As aforesaid, there is considerable substance in this contention, and the learned Magistrate clearly erred in entertaining the complaint and in issuing the process thereon in absence of even prima facie material to show that the accused was the drawer of the cheque in question and that the complainant was the drawee in respect of the same cheque.

5. For the aforesaid reasons, the impugned order of the learned Magistrate rejecting the application of the accused at exh.10 is clearly bad and illegal and deserves to be quashed and set aside. The same is accordingly quashed and set aside. Consequently, the complaint, as also the process issued thereon, are quashed and set aside.

6. Rule is accordingly made absolute.

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